STATE OF NORTH CAROLINA	BEFORE A STATE HEARING REVIEW OFFICER FOR THE STATE BOARD OF EDUCATION PURSUANT TO N.C. GEN. STAT. § 115C-109.9
[redacted] *by and through her parent,* [redacted] Petitioners, v. Charlotte-Mecklenburg Schools Board of Education, Respondent.	**DECISION AFFIRMING ORDERS ACCEPTING SETTLEMENT AND GRANTING IN PARTAND DENYING IN PART RESPONDENT'S MOTION TO DISMISS** 17 EDC 08131

This **DECISION** resolves Petitioner's March 1, 2018, Notice of Appeal of the Honorable Administrative Law Judge [ALJ] Selina Malherbe's orders (1) granting in part and denying in part Respondent's Motion to Dismiss, dated December 29, 2017, and (2) accepting settlement, dated February 2, 2018.

APPEARANCES:

For Petitioner-Appellant: Tammy H. Kom, LEGAL SERVICES FOR CHILDREN OF N.C., 3326 Durham Chapel Hill Blvd. Suite 210-C, Durham, NC 27707.

For Respondent-Appellee: Andre F. Mayes, CHARLOTTE-MECKLENBURG SCHOOLS, 600 E. Fourth Street, 5th Floor, Charlotte, NC 28202.

THE RECORDS received for review in connection with this appeal include:

1. The following materials contained in a package delivered to the undersigned on March 12, 2018:

    a. A letter signed by William J. Hussey, Director, Exceptional Children Division, and dated March 2, 2018, providing "formal notice of . . . appointment as State Hearing Review to review . . . 17 EDC 08131," the above-captioned case;
    b. A "Certification" form indicating that "the attached (electronic USB memory stick) [is] a true copy of the Official Record . . . in the case 17 EDC 08131;"
    c. An "Official Record Index Sheet" captioned 17 EDC 08131;
    d. A copy of Petitioner's Notice of Appeal in the above-captioned case;
    e. A copy of Petitioner's Petition for a Contested Case Hearing (Special Education) in the above-captioned matter; and

f. A USB memory stick labeled 17 EDC 08131.

2. Additional Written Arguments submitted by Petitioner and Respondent to the undersigned Review Officer via email on March 26, 2018.

ISSUES ON APPEAL:

In Petitioner's Written Arguments on Appeal, Petitioner identified two issues for consideration on appeal:

1. Whether "the ALJ Erred in Dismissing Petitioners' Claims Prior to December 1, 2016, in the December 29, 2017 Order" (Petitioners' Written Arguments on Appeal p. 3); and

2. Whether "the ALJ Erred in Failing to Order Judgment be Entered for Petitioners in the February 2, 2018, Order" (Petitioners' Written Arguments on Appeal p. 12).

PRELIMINARY STATEMENT on the Standard of Review:

The undersigned's review of the findings and decisions subject to appeal is in accordance with the provisions of 20 U.S.C. § 1415(g), 34 C.F.R. § 300.514, N.C. Gen. Stat. § 115C-109.9, and North Carolina's *Policies Governing Services for Children with Disabilities*, NC 1504-1.15.

Under these procedures, the Review Officer must render an "independent decision" following impartial review of the entire record, giving "due weight" to the administrative proceedings before the administrative law judge. *Board of Education v. Rowley*, 458 U.S. 176, 207 (1982); *see also Doyle v. Arlington County School Board*, 953 F.2d 100 (4th Cir. 1991) (evaluating a decision flowing from Virginia's two-tiered administrative process).

The Fourth Circuit Court of Appeals interprets this "due weight" requirement to mean that "findings of fact by the hearing officers in cases such as these are entitled to be considered *prima facie* correct, akin to the traditional sense of permitting a result to be based on such fact-finding, but not requiring it." *Doyle*, 953 F.2d at 105; *see also J.P. v. County School Board of Hanover County*, 516 F.3d 254, 259 (4th Cir. 2008) ("In this circuit, we interpret *Rowley*'s 'due weight' requirement to mean that the findings of fact made in the state administrative proceedings must 'be considered *prima facie* correct.'" (citing *Doyle*, 953 F.2d at 105)).

Now, having reviewed the records received in connection with this case, including the Certified Official Record, the Review Officer for the State Board of Education independently and impartially offers the following Findings of Fact in accordance with 20 U.S.C. § 1415(g), 34 C.F.R. § 300.514, N.C. Gen. Stat. § 115C-109.9, and the *Policies Governing Services for Children with Disabilities*, NC 1504-1.12.

FINDINGS OF FACT

This statement of factual findings offers relevant facts in three parts: (1) procedural-history facts, (2) background facts pertinent to the first issue on appeal regarding the ALJ's dismissal of

Petitioner's claims under North Carolina's 1-year statute of limitations, and (3) background facts pertinent to the second issue on appeal regarding the ALJ's acceptance of the parties' settlement.

PROCEDURAL HISTORY:

1. On December 1, 2017, Petitioner, through counsel, filed a Petition for a Contested Case Hearing (Special Education) pursuant to the Individuals with Disabilities Education Improvement Act, 20 U.S.C. § 1400 et seq., N.C. Gen. Stat. § 115C-109.6 et seq., and Article 3 of Chapter 150B of the North Carolina General Statutes. The Petition raised claims related to Respondent's provision of a free, appropriate public education to L.F, a 7-year-old student who had been in home school since January 2017.

2. December 18, 2017, Respondent, through counsel, filed a Response to the Petition for a Contested Case Hearing along with a Motion to Dismiss.

3. On December 28, 2017, Petitioner, through counsel, filed a Response in Opposition to Respondent's Motion to Dismiss.

4. On December 29, 2017, the Honorable Administrative Law Judge (ALJ) Selina Malherbe, "after careful consideration of the motion papers, legal arguments made and authorities cited, and the entire record," entered an Order Granting in Part and Denying in Part Respondent's Motion to Dismiss.

5. In the December 29, 2017, Order ALJ Malherbe granted Respondent's Motion to Dismiss in part by dismissing "all issues arising prior to December 1, 2016 based on a one-year statute of limitations;" and she denied that motion in part by allowing "issues related to the IDEA's Access Rights" to proceed.

6. On January 22, 2018, Respondent, through counsel, filed and served an Offer of Settlement "pursuant to 34 C.F.R. § [300.]517 and the North Carolina *Policies Governing Services for Children with Disabilities* § 1504-1.18(c)(2)," specifically stating that the offer "does not constitute an admission of liability."

7. On January 30, 2017, Petitioner, through counsel, submitted "Petitioners' Notice of Acceptance of Respondent's Offer of Settlement and Proof of Service," stating that "Petitioners hereby provide notice that they have accepted Respondent's Offer of Settlement to Plaintiff dated January 24, 2018,"[1] and also declaring Petitioner to be "a prevailing party"

[1] Respondent originally filed this Offer of Settlement on January 22, 2018, in the official record. This original filing of the Offer of Settlement was not submitted under seal. Petitioner filed a Motion to Strike the January 22, 2018, offer seeking to have it placed under seal. The ALJ granted Petitioner's motion and ordered that "[t]he Offer of Settlement [that] was filed in the official record is hereby specifically placed under separate seal." As a result, Respondent's January 22, 2018, offer was removed from the official record and placed under seal on January 24, 2018. The Petitioner's Notice of Acceptance of Respondent's Offer of Settlement and Proof of Service, however, identifies January 24, 2018, as the date of the offer

and stating that Petitioner "will be seeking their attorneys' fees and costs, Pursuant to Rule 68."

8. On February 1, 2018, ALJ Malherbe conducted a Telephone Conference with the parties and determined that "acceptance of this Offer of Settlement was done voluntarily and under no undue coercion, with both parties having fully read and understanding said Offer of Settlement; and, both parties believing it was in each of their and the parties they represent best interest." (Order Accepting Settlement, p. 1).

9. On February 2, 2018, ALJ Malherbe entered an Order Accepting Settlement in which she found that "[t]he parties have agreed upon a compromise settlement of all matters and things in controversy between them, the terms of which are fully contained in the Offer of Settlement" and that "[p]arent understands that the settlement is complete and final, and approves of said settlement on behalf of the child, [redacted] *Id.*

10. The February 2, 2018, Order Accepting Settlement ultimately concluded that "by and with the consent of the parties, and upon notification by the Petitioner, the undersigned Administrative Law Judge finds that no further proceedings are needed or required to resolve the contested case" and ordered it "CLOSED." *Id.*

11. On March 1, 2018, Petitioner filed Notice of Appeal of the ALJ Malherbe's orders (1) granting in part and denying in part Respondent's Motion to Dismiss, dated December 29, 2017, and (2) accepting settlement, dated February 2, 2018.

12. On March 12, 2018, the undersigned received a package in containing a letter notifying her of her appointment as State Hearing Review Officer in the above-captioned case.

13. On March 26, 2018, Petitioner, through counsel, submitted to the undersigned Petitioners' Written Arguments on Appeal, arguing two points of error as follows:

    a. "The ALJ Erred in Dismissing Petitioners' Claims Prior to December 1, 2016, in the December 29, 2017 Order" (Petitioners' Written Arguments on Appeal p. 3); and
    b. "The ALJ Erred in Failing to Order Judgment be Entered for Petitioners in the February 2, 2018, Order" (Petitioners' Written Arguments on Appeal p. 12).

14. Also on March 26, 2018, Respondent, through counsel, submitted to the undersigned Respondent's Arguments in Response to Petitioner's Notice of Appeal, offering arguments on two issues:

    a. "Petitioner is not a prevailing party and therefore is not entitled to attorneys' fees" (Respondent's Arguments, p. 2); and

rather than January 22, 2018, and it attaches an offer that is identical to the one contained under seal in the record except that it is dated January 24, 2018, rather than January 22, 2018.

b. "Petitioner is not an 'aggrieved party' as there was a voluntary settlement between the parties" (Respondent's Arguments, p. 4).

BACKGROUND FACTS REGARDING THE DISMISSAL OF ALL ISSUES ARISING PRIOR TO DECEMBER 1, 2016, AS BARRED BY NORTH CAROLINA'S ONE-YEAR LIMITATIONS PERIOD:

15. Petitioner's Notice of Appeal challenges the ALJ's December 29, 2017, Order Granting in Part and Denying in Part Respondent's Motion to Dismiss because that Order dismissed all of Petitioner's claims "arising prior to December 1, 2016, based on a one-year statute of limitations."

16. Petitioner's Written Arguments on Appeal to the undersigned repeat the arguments Petitioner made before ALJ Malherbe as she resolved Respondent's motion to dismiss and dismissed all issues in the case arising prior to December 1, 2016; in these arguments, Petitioner contends that the ALJ improperly interpreted North Carolina's statute establishing the one-year limitation period and that, even if the ALJ interpreted that statute properly, Petitioner's claims should not be barred because one or more of the expressed exceptions should apply.

17. The record reflects, and Petitioner's Written Arguments on Appeal and other filings acknowledge, the following relevant facts:

    a. Subsequent to the issuance of the ALJ's December 29, 2017, decision dismissing all issues arising prior to December 1, 2016, Respondent filed and served, on January 22, 2018, an Offer of Settlement, and on January 24, 2019, served another identical (except the date) Offer of Settlement;
    b. Also subsequent to the issuance of the ALJ's December 29, 2017, decision, on January 30, 2018, Petitioner filed and served a Notice of Acceptance of Respondent's Offer of Settlement and Proof of Service;
    c. Neither the Offer of Settlement nor the Notice of Acceptance of Respondent's Offer of Settlement indicate that any claims or issues raised in the case would remain subject to further proceedings following settlement;
    d. To the contrary, in Petitioner's January 30, 2018, Notice of Acceptance, Petitioner stated: "Petitioners hereby provide notice that they have accepted Respondent's Offer of Settlement to Plaintiff dated January 24, 2018," with no exception preserving an appeal of claims resolved through the December 29, 2017, Decision;
    e. On February 1, 2018, in a telephone conference with the presiding ALJ about the "the nature of the process and acceptance of the Offer of Settlement," the parties, including Petitioner, affirmed that the offer and acceptance of settlement was "done voluntarily and under no undue coercion, with both parties . . . believing it was in each of their and the parties they represent best interest;"
    f. On February 2, 2018, ALJ Malherbe, entered an Order Accepting Settlement, stating that she "accept[ed] the uncontradicted facts and conclusion contained within the Offer of Settlement as the uncontradicted facts and conclusions in this case and further accepts the parties' settlement of this matter;"
    g. Also in the February 2, 2018, Order, the ALJ found that "[t]he matters in controversy between the parties, including, but not limited to, **all claims asserted by, or on behalf**

of student [redacted] have now been duly settled and compromised. The parties have agreed upon a compromise settlement of all matters and things in controversy between them" (emphasis added);

h. Also in the February 2, 2018, Order Accepting Settlement, the ALJ "by and with consent of the parties, and upon notification by the Petitioner," found that "**no further proceedings are needed or required** to resolve the contested case cited above" (emphasis added);

i. Because all issues before the ALJ were resolved through settlement, the ALJ "ORDERED that the above-captioned case is hereby CLOSED."

18. Settlements in special education cases, like settlements in other cases, are generally viewed as binding. *See generally*, MARK WEBER, SPECIAL EDUCATION LAW AND LITIGATION TREATISE (4th ed. 2017).

19. Petitioners in special education cases, like parties in other cases, cannot unilaterally change the terms of the settlement after agreement. *See e.g., Kreher v. Orleans Parish School Board*, 1996 WL 715506, 25 IDELR 40 (E.D. La. 1996) (enforcing terms of original settlement and awarding attorneys' fees to a school board in an action under the IDEA and the Rehabilitation Act of 1973 because Petitioner unilaterally modified the terms of a settlement after the parties had reached an agreement and reduced it to writing with an "order of dismissal" in federal court).

20. Petitioner agreed to settle this case on the terms of Respondent's Offer of Settlement; "the uncontradicted facts and conclusion contained within the Offer of Settlement" have been accepted by the ALJ with the consent of the parties; and "[t]he matters in controversy between the parties, including, but not limited to, all claims asserted by, or on behalf of [redacted] have been duly settled and compromised." Order Accepting Settlement, p. 1.

21. Nothing in the Offer of Settlement, Notice of Acceptance of Settlement, or Order Accepting Settlement preserves any claims asserted by, or on behalf of [redacted] in the Petition for Contested Case Hearing for further litigation or appeal; instead, these writings establish that "no further proceedings are needed or required" in this case because the settlement resolved "all claims asserted by, or on behalf of, the student [redacted] Order Accepting Settlement, pgs. 1 & 2.

22. Because Petitioner settled "all claims asserted by, or on behalf of, the student [redacted] Petitioner cannot now challenge the ALJ's decision dismissing all of Petitioner's claims "arising prior to December 1, 2016."

23. The findings and conclusions of the ALJ in the February 2, 2018, Order Accepting Settlement, are fully incorporated herein, and the additional findings expressed above are intended to supplement, not supersede, the findings of the ALJ, which are fully supported by an independent review of the record.

BACKGROUND FACTS REGARDING THE ORDER ACCEPTING SETTLEMENT:

24. Petitioner's Notice of Appeal challenges ALJ Malherbe's February 2, 2018, Order Accepting Settlement.

25. Petitioner's Written Arguments on Appeal assert that ALJ Malherbe erred in entering this Order Accepting Settlement without also entering judgment expressly finding in favor of the Petitioner.

26. Petitioner's Written Arguments do *not* argue that Petitioner did not or does not agree to the terms of the settlement as offered, and Petitioner does not contend that Petitioner wants out of the settlement.

27. Petitioner cites no direct authority to support the position that an ALJ's Order Accepting Settlement must contain an express provision in favor of the Petitioner *or* Respondent.

28. Petitioner argues that:

    a. Rule 68 of the Federal Rules of Civil Procedure governs an ALJ's acceptance of agreed-upon settlements when those settlements are presented under circumstances in which attorneys' fees might ultimately be impacted as described in 20 U.S.C § 1415(i)(3)(D)(i), 34 C.F.R. § 300.517, and North Carolina Policy 1504-1.18(c)(2), and
    b. the sentence in Rule 68 stating that "[t]he clerk must [] enter judgment" following an accepted offer of settlement that complies with the requirements of Rule 68, means that an ALJ must enter judgment expressly *in favor of Petitioner and against Respondent* when an accepted offer of settlement is presented under analogous circumstances in the Office of Administrative Hearings.

29. Petitioner argues that Rule 68 in its entirety governs an ALJ's response to accepted offers of settlement because "[t]he IDEA and the North Carolina Policies both expressly incorporate Rule 68 of the Federal Rules of Civil Procedure by reference." (Petitioner's Written Arguments on Appeal, p. 14). Petitioner offers no further authority to support the application of Rule 68 to the issue on appeal – whether the ALJ was required by Rule 68 to enter judgment *in favor of Petitioner and against Respondent* following Petitioner's acceptance of Respondent's Offer of Settlement in this special education dispute under the IDEA.

30. While it is correct that "[t]he IDEA and the North Carolina Policies both expressly incorporate Rule 68 of the Federal Rules of Civil Procedure by reference," the express incorporation is limited.

31. The IDEA, at 20 U.S.C § 1415(i)(3)(D)(i), provides in section 1415 on "Procedural Safeguards," in subsection (i)(3) on "Jurisdiction of District Courts; Attorneys' Fees," in part (D) on "Prohibition of attorneys' fees and related costs for certain services," in subpart (i)(I) as follows:

    (i) In general Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if --

(I) **the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins**;
(II) the offer is not accepted within 10 days; and
(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(Emphasis added).

32. The regulations implementing the IDEA and North Carolina's Policies reference Rule 68 in the same context and the same manner.

33. These statutory, regulatory, and policy provisions, appearing under the subsection on "Jurisdiction of District Courts; Attorneys' Fees," reference only "the time prescribed by Rule 68," nothing further. Petitioner offers no authority to support Petitioner's position that other provisions of Rule 68 apply to the issue on appeal.

34. Assuming for purposes of Petitioner's argument, however, that provisions other than the "time prescribed by Rule 68" control the ALJ's Order Accepting Settlement, it does not necessarily follow that Rule 68's command that "[t]he clerk must [] enter judgment" means that an ALJ must enter judgment expressly *in favor of Petitioner and against Respondent* when an accepted offer of settlement is presented in a special-education dispute in the Office of Administrative Hearings.

35. While Rule 68 states that "[t]he clerk must [] enter judgment" following acceptance of an offer of settlement under that rule in federal court, Rule 68 does *not* state that the clerk must enter judgment *in favor of the Petitioner and against the Respondent*.

36. In North Carolina, neither ALJs nor State Hearing Review Officers have authority to issue awards of attorneys' fees. *See* Memorandum of Understanding between NC DPI and OAH, p. 5.

37. Entry of an order *in favor of Petitioner and against Respondent* implicates the question of attorneys' fees. Petitioner asserts that Petitioner is the "prevailing party" and that Petitioner "will be seeking their attorneys' fees and costs."

38. Attorneys' fees are available in federal court to prevailing parties following resolution of claims through the administrative process. The IDEA provides in section 1415 on "Procedural Safeguards" and in subsection (i)(3) on "Jurisdiction of District Courts; Attorneys' Fees," as follows:

(3) Jurisdiction of District Courts; Attorneys' Fees
(A) In general
The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.
(B) Award of attorneys' fees

> (i) In general in any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs –
>
> (I) to a prevailing party who is the parent of a child with a disability;
> (II) to a prevailing party who is a State educational agency or local educational agency against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or
> (III) to a prevailing State educational agency or local agency against the attorney of the parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to increase the cost of litigation.

39. Although ALJs and SROs are authorized to determine prevailing-party status, neither is required to do so. *See* Memorandum of Understanding between NC DPI and OAH, p. 5.

40. Respondent's Offer of Settlement expressly stated that "[t]his offer does not constitute an admission of liability" for any of Petitioner's claims. It did *not* offer to designate Petitioner as a prevailing party or to stipulate that the settlement terms meant that the case was resolved in Petitioner's favor.

41. Respondent's Offer of Settlement was made "pursuant to 34 C.F.R. [§ 300.]517 and the North Carolina *Policies Governing Services for Children with Disabilities* § 1504-1.18(c)(2), *not* pursuant to Rule 68 of the Federal Rules of Civil Procedure.

42. Petitioner's Notice of Acceptance of Respondent's Offer of Settlement and Proof of Service stated in full as follows:

> Petitioners [redacted] and [redacted] by and through their attorney, hereby **file this Notice of Acceptance of Respondent's Offer of Settlement, pursuant to** 20 U.S.C. § 1415(i)(3), 34 C.F.R. § 300.517 and **Rule 68 of the Federal Rules of Civil Procedure**. Petitioners hereby provide notice that they have accepted Respondent's Offer of Settlement to Plaintiff dated January 24, 2018, attached hereto as Exhibit A. Petitioners served Respondent with written notice of acceptance of the Offer of Settlement on January 30, 2018, attached hereto as Exhibit B. Proof of service by facsimile is attached hereto as Exhibit C. **Petitioners are a prevailing party and will be seeking their attorneys' fees and costs, Pursuant to Rule 68**.
> (Emphasis added).

43. In other words, Petitioner added, unilaterally, to its Notice of Acceptance of Respondent's Offer of Settlement two relevant terms that were not included in Respondent's Offer of Settlement:

a. First, Petitioner added a statement that "Petitioners are a prevailing party and will be seeking their attorneys' fees and costs, pursuant to Rule 68."
b. Second, Petitioner stated that Petitioner's Notice of Acceptance was filed pursuant to "Rule 68 of the Federal Rules of Civil Procedure," even though Respondent's Offer of Settlement was not filed pursuant to that rule.

44. Respondent did not agree to that unilateral addition of those terms to its Offer of Settlement. On January 30, 2018, in response to an email from Petitioner's attorney that had delivered written notice of Petitioner's acceptance of Respondent's Offer of Settlement, Respondent sent an email to Petitioner's counsel stating as follows:

> Ms. Kom, I am in receipt.
>
> Also, as you are aware, the Court determines whether a party is a prevailing party. Respondent does not agree that Petitioner is the prevailing party and will oppose your request for attorney fees and costs.
>
> (*See* Respondent's Written Arguments on Appeal, Exhibit 1).[2]

45. The next day, Petitioner sent an email to the Chief Hearings Clerk at OAH asking, "Is there going to be a formal Judgment filed on the docket or provided the parties, or is the date of Petitioner's filing considered the date of entry of the judgment" under Rule 68? (*See* Petitioner's Written Arguments on Appeal, Exhibit G, email dated 1/31/18 from Petitioner's counsel to Chief Hearings Clerk at OAH).

46. The Chief Hearing Clerk replied to Petitioner copying ALJ Malherbe's paralegal, and inviting ALJ Malherbe's paralegal to bring the question to ALJ Malherbe's attention.

47. The next day, February 1, 2018, ALJ Malherbe's paralegal replied to Petitioner's email and explained that "ALJ Malherbe stated that Rule 68 reference below relates to the Clerk of Superior Court, not the OAH Clerk's Office, so no final judgment is required. . . ." (*See* Petitioner's Written Arguments on Appeal, Exhibit G, email dated 2/1/18 from ALJ Malherbe's paralegal to Petitioner's counsel).

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[2] Petitioner's Written Arguments on Appeal assert that "at no point after Petitioners accepted Respondent's Offer of Settlement . . . did Respondents object in any way to Petitioners' actions" in attempting to bring the settlement under Rule 68 and in declaring prevailing-party status, *see* Petitioner's Written Arguments on Appeal, p. 15, but the record on appeal reflects otherwise. Not only did Respondent object in writing directly to the email in which Petitioner's counsel offered its written acceptance of Respondent's Offer of Settlement, but also the ALJ held a telephone conference to hear from the parties on these issues and subsequently found that "[t]he parties have agreed upon a compromise settlement of all matters and things between them, **the terms of which are fully contained in the Offer of Settlement**," not the Petitioner's Notice of Acceptance of Respondent's Offer of Settlement which contained the additional terms unilaterally added by Petitioner without agreement by Respondent.

48. Petitioner replied to ALJ Malherbe's paralegal expressing "some confusion over the Rule 68 Offer of Settlement," and requesting a "phone conference with Judge Malherbe . . . to gain clarity." (Petitioner's Written Arguments on Appeal, Exhibit G, email dated 1/1/18 from Petitioner's counsel to ALJ Malherbe's paralegal).

49. In response to Petitioner's request for a phone conference with Judge Malherbe, the parties and ALJ Malherbe held a phone conference that afternoon, February 1, 2018, during which ALJ Malherbe "made inquiry into the nature of the process and acceptance of the Offer of Settlement." (Order Accepting Settlement, Finding of Fact ¶ 4, p. 1.)

50. After the February 1, 2018, telephone conference ALJ Malherbe was "satisfied that the acceptance of this Offer of Settlement was done voluntarily and under no undue coercion, with both parties having fully read and understanding said Offer of Settlement; and, both parties believing it was in each of their and the parties they represent best interest." *Id.*

51. Ultimately, ALJ Malherbe accepted the facts and conclusions "contained within the Offer of Settlement" as the "uncontradicted facts and conclusions in this case." *Id.* But ALJ Malherbe did *not* accept the two additions the Petitioner had unilaterally added in the Notice of Acceptance. Instead, following the telephone conference on February 1, 2018, ALJ found that "all claims asserted by, or on behalf of, the student [redacted] have now been duly settled and compromised" because "[t]he parties have agreed upon a compromise settlement of all matters and things in controversy between them, **the terms of which are fully contained in the Offer of Settlement**." (Order Accepting Settlement, ¶ 2, p. 1, emphasis added).

52. Thus, "by and with the consent of the parties," ALJ Malherbe found that "no further proceedings are needed or required to resolve the contested case" and "CLOSED" it.

53. On appeal, as Petitioner again argues that the terms Petitioner unilaterally added to Respondent's Offer of Settlement – that Rule 68 governs the settlement and that Petitioner is a prevailing party who Rule 68 entitles to entry of a judgment *in Petitioner's favor* and against Respondent – must be included in the ALJ's Order Accepting Settlement.

54. But Petitioner again presents no primary or secondary authority supporting Petitioner's position that Rule 68's command that a clerk "enter judgment" in federal court following parties' compliance with other provisions of that rule requires, in special-education cases in North Carolina's Office of Administrative Hearings, the additions to an accepted offer of settlement that Petitioner seeks.

55. The record evidence before the undersigned, reviewed independently, supports the ALJ's decision to accept the parties' settlement on the terms of the Respondent's Offer of Settlement, as it had been agreed to by Petitioner and as she understood the parties desired, without adding the additional terms requested by Petitioner and objected to by Respondent.

Based on the foregoing Findings of Fact, the undersigned State Hearing Review Officer affirms the conclusions of the ALJ in the two orders on appeal and makes the following further:

CONCLUSIONS OF LAW

1. The North Carolina Office of Administrative Hearings and the State Hearing Review Officer for the State Board of Education have jurisdiction over special education proceedings pursuant to Chapter 115C, Article 9, of the North Carolina General Statutes; NC 1500 *Policies Governing Services for Children with Disabilities*; the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. §1400 et seq.; and IDEA's implementing regulations, 34 C.F.R. Part 300.

2. To the extent that the Findings of Fact contain Conclusions of Law or that the Conclusions of Law are Findings of Fact, they should be considered without regard to their given labels.

3. Any issue not expressly identified Petitioner's March 1, 2018, Notice of Appeal is not properly before this Tribunal and cannot be resolved by this State Hearing Review Officer. *See E.L. ex rel. G.L. v. Chapel Hill-Carrboro Bd. of Educ.*, 975 F. Supp. 2d 528, 635 n.8 (M.C.N.C. 2013) (stating that "under North Carolina law state review officers review only the issues specifically appealed"), *aff'd sub nom E.L. ex rel. Lorsson v. Chapel Hill-Carborro Bd. of Educ.,* 773 F.3d 509, 516 (4th Cir. 2014) (affirming that "the review officer had jurisdiction to review only those findings and decisions *appealed*") (emphasis in original).

4. Respondent is a local education agency receiving monies pursuant to 20 U.S.C. § 1400 et seq. and the agency responsible for providing educational services in Mecklenburg County, North Carolina. The Respondent is subject to the provisions of applicable federal and state laws and regulations, specifically 20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300 et seq.; N.C. Gen. Stat. 115C-106 et seq.; *Policies Governing Services for Children with Disabilities* NC 1500 et seq.

5. The record evidence supports the findings of fact and conclusions of law contained in ALJ Malherbe's February 2, 2018, Order Accepting Settlement, and no authority presented to the undersigned required ALJ Malherbe to further find or conclude that Petitioner was a prevailing party or that the acceptance of the settlement was "against the Respondent" and "in favor of Petitioner."

6. Petitioner's Acceptance of Respondent's Offer of Settlement to resolve "all claims asserted by, or on behalf of, the student [redacted] as found by ALJ Malherbe, in fact resolved *all* claims asserted by, or on behalf of, the student [redacted] in the Petition for Contested Case Hearing filed on December 1, 2017, including claims Petitioner now disputes in her appeal of the December 29, 2017, Order Granting in Part and Denying in Part Respondent's Motion to Dismiss.

7. The parties' settlement of this case, as accepted by ALJ Malherbe, renders moot the issues originally raised within it. *See generally* 13B Fed. Prac. & Proc. Juris. § 3533.2 (3rd ed. April 2018 update) ("Mootness problems arise from a wide array of circumstances. . . . The easiest cases are those in which plaintiff . . . agrees to a settlement of all issues. . . . A settlement of all claims among all parties removes the necessary element of adversariness and moots the action.").

8. Although Petitioner expressed desire for ALJ Malherbe to designate Petitioner as the prevailing party in this case, and although ALJ Malherbe had authority to designate Petitioner as the prevailing party in this case if she felt that the evidence before her justified such designation, ALJ Malherbe did *not* to make such designation. ALJ Malherbe accepted the parties' settlement as offered and accepted and closed the case on the agreed-upon terms. The record evidence supports ALJ Malherbe's discretionary decision *not* to add a finding or conclusion to the terms of the settlement and declare Petitioners a prevailing party or to enter judgment expressly in Petitioner's favor and against Respondent.

9. Neither the ALJ nor the Undersigned has authority to award attorneys' fees to either Petitioner or Respondent. Neither of the decisions on appeal before the undersigned expressly addressed attorneys' fees for either Petitioner or Respondent.

10. Comprehensive settlements that are silent with respect to attorneys' fees moot the case, but, on appropriate facts, they do not automatically defeat a separate claim for attorneys' fees. Whether the facts of this case support such a claim is not properly before the undersigned.

Based on the foregoing Findings of Fact and Conclusion of Law, the undersigned Hearing Review Officer for the North Carolina Board of Education makes the following:

DECISION

The DECISIONS issued by Administrative Law Judge Selina Malherbe on December 29, 2017, and February 2, 2018, are **AFFIRMED IN FULL.**

NOTICE

Any party aggrieved by this Decision may institute a civil action in state court within 30 days after receipt of this Decision as provided in N.C. Gen. Stat. § 115C-109.9 or file an action in federal court within 90 days as provided in 20 U.S.C. § 1415. Please notify the Exceptional Children Division, North Carolina Department of Public Instruction, in writing of such action so that the records for this case can be forwarded to the court.

This the 20th day of April, 2018.

/s/ Lisa Lukasik
Lisa Lukasik
Review Officer

CERTIFICATE OF SERVICE

The foregoing DECISION was served on the Petitioner and the Respondent by **E-mail and ordinary U.S. Mail**, addressed as follows:

Tammy H. Kom
Legal Services for Children of N.C.
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The foregoing DECISION was served on the Petitioners, North Carolina Department of Public Instruction, Dispute Resolution Consultant, Office of Administrative Hearings, and the Charlotte-Mecklenburg Schools Board of Education via **ordinary U.S. mail**, addressed as follows:

William J. Hussey
Director, Exceptional Children's Division
North Carolina Department of Public Instruction
6356 Mail Center
Raleigh, NC 27699-6356

Office of Administrative Hearings
State of North Carolina
6714 Mail Service Center
Raleigh, NC 27699-6714

Petitioner [redacted]
by and through her parent, [redacted]
[redacted]

Tersea King
Dispute Resolution Consultant
Exceptional Children Division
NC Department of Public Instruction
6356 Mail Service Center
Raleigh, NC 27699-6356

Dr. Clayton M. Wilcox
Superintendent
Charlotte-Mecklenburg Schools
Board of Education
P.O. Box 30035
Charlotte, NC 28203

This the 20th day of April, 2018.

/s/ Lisa Lukasik
Lisa Lukasik
Review Officer